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No. _____

Supreme Court, U.S.
FILED
JUL 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

CONSOLIDATION COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

ALBERT C. DAYTON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

The Petition for a Writ of Certiorari asks the Court to resolve two questions deferred in *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988):

1. Does section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), require a mine operator to pay black lung disability benefits to former employees who do not have black lung disease?

2. If section 402(f)(2) of the Black Lung Benefits Act does not allow coal mine operators to defend black lung claims by proving the absence of black lung disease, does section 402(f)(2) violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Albert C. Dayton is a claimant for benefits under the Black Lung Benefits Act. He was the petitioner below and is a respondent here. Consolidation Coal Company ("Consol") is the mine owner that last employed Mr. Dayton. Consol was the respondent below and is the petitioner here. Consol is a wholly owned subsidiary of E. I. DuPont de Nemours & Company.

The Director, Office of Workers' Compensation Programs, ("the Government") is the administrator of the black lung program and is a statutory party-in-interest in black lung claims. 30 U.S.C. § 932(k). The Director is a respondent here.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Consolidation Coal Company respectfully petitions for a writ of certiorari to review the judgment and opinions issued in this case by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 895 F.2d 173. App. 2-7. The order of the court of appeals

denying the Government's request for rehearing and suggestion for rehearing in banc is unreported. App. 1. The decisions and orders by the Benefits Review Board, United States Department of Labor (App. 8-13), and the administrative law judge (App. 14-27) are unreported.

JURISDICTION

The judgment of the court of appeals was rendered on February 5, 1990. The court of appeals extended the time for the filing of a petition for rehearing by the Government until March 16, 1990. The Government timely filed its petition for rehearing which the court denied by order dated April 20, 1990. App. 1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES & REGULATIONS INVOLVED

The following authorities are reprinted in the Appendix:

1. The Fifth Amendment to the Constitution of the United States. App. 28.

2. Section 401(a) of the Black Lung Benefits Act, 30 U.S.C. § 901(a) (1982). App. 29.

3. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(1), (2) (1982). App. 30-31.

4. Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. § 923(b) (1982). App. 32-34.

5. Section 422(c) of the Black Lung Benefits Act, 30 U.S.C. § 932(c) (1982). App. 35.

6. Social Security Administration interim presumption, 20 C.F.R. § 410.490 (1989). App. 36-39.

7. Department of Labor interim presumption, 20 C.F.R. § 727.203 (1989). App. 40-42.

STATEMENT OF THE CASE

A. Background

This petition asks the Court to validate the provisions of the Department of Labor's interim presumption ("DOL interim presumption") that allow rebuttal of the presumption by proof of (i) the absence of disability due in whole or in part to coal workers' pneumoconiosis, or (ii) the absence of coal workers' pneumoconiosis. 20 C.F.R. § 727.203(b)(3),(4).

The DOL interim presumption was promulgated by the Secretary of Labor in response to Section 2(c) of the Black Lung Benefits Reform Act of 1977. Pub. L. No. 95-239, § 2(c), 92 Stat. 95, 95-96 (1978)(amending 30 U.S.C. § 902(f)). In that statute, Congress directed the Secretary of Labor to review all pending and denied Part C claims[1]

[1] Part C claims are claims filed after December 31, 1973, and are adjudicated by the Department of Labor instead of the Social Security Administration, which is responsible for claims filed prior to January 1, 1974 (i.e., Part B claims)

under criteria which "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." *Id.* A claim filed on June 30, 1973 was subject to the interim presumption adopted by the Secretary of Health, Education and Welfare for Part B claims ("SSA interim presumption"). 20 C.F.R. § 410.490.

The two interim presumptions differ in their express rebuttal provisions. The SSA presumption expressly provides for rebuttal by evidence that the miner is doing his usual coal mine work or comparable and gainful work, or is able to do his usual coal mine work or comparable and gainful work. 20 C.F.R. § 410.490(c)(1),(2). The DOL presumption contains rebuttal provisions that are similar to section 410.490(c). 20 C.F.R. § 727.203(b)(1), (2). In addition, the DOL presumption expressly provides for rebuttal by proof that the miner's disability or death is not due in whole or in part to coal workers' pneumoconiosis, or by proof of the absence of coal workers' pneumoconiosis. *Id.* § 727.203(b)(3),(4).

The two interim presumptions also differ in their provisions for presumption invocation. The SSA presumption may be invoked by x-ray, biopsy or autopsy evidence of coal workers' pneumoconiosis or, in the case of a miner with at least fifteen years of underground coal mine employment, ventilatory test results equal to or less than certain specified values. 20 C.F.R. § 410.490(b). The DOL presumption may be invoked only by miners with at least ten years of coal mine employment and evidence of either (i) pneumoconiosis by x-ray, biopsy or autopsy; (ii) ventilatory test results identical to those provided by the SSA interim presumption; (iii) blood gas test results equal to or less than certain specified values; (iv) other medical

evidence, including medical opinion evidence, which establishes the existence of a totally disabling respiratory or pulmonary impairment; and (v) lay evidence demonstrating the existence of a totally disabling lung impairment in survivors' claims where no medical evidence is available.

This Court invalidated that portion of the DOL interim presumption that required a miner to have at least ten years of coal mine employment in order to invoke the presumption with x-ray, biopsy or autopsy evidence of coal workers' pneumoconiosis. *Pittston Coal Group v. Sebben*, 488 U.S. 105, 109 S. Ct. 414 (1988). The court found that the requirement of at least ten years of coal mine employment constitutes a criterion under the DOL interim presumption that is more restrictive than the "criteria" provided by the SSA presumption. This Court held that section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), prohibits the Department of Labor from applying criteria in its interim presumption that are more restrictive than the criteria applicable to a claim decided under the SSA presumption. This Court limited its discussion of the term "criteria" in *Pittston Coal Group* to the affirmative factors for invoking the DOL interim presumption. 109 S. Ct. at 420, 422-23.

The Court of Appeals for the Fourth and Seventh Circuits have relied upon this Court's decision in *Pittston Coal Group* to invalidate the DOL rebuttal provisions that allow a mine operator to defend a claim by proving the absence of disability due in whole or in part to coal workers' pneumoconiosis or the absence of coal workers' pneumoconiosis. *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), *petition for cert. filed*, No. ___ (U.S. July ___,

1990); *Taylor v. Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. May 2, 1990) (No. 89-1696). In the instant case, the Fourth Circuit relied upon its decision in *Taylor v. Clinchfield Coal Co.* to reverse a finding by an administrative law judge that the claimant is not entitled to benefits because the responsible mine operator proved that Mr. Dayton does not have black lung disease. App. 2-7.

B. Albert Dayton's Claim

Albert Dayton filed his claim with the Department of Labor on November 26, 1979. This claim is subject to review under the DOL interim presumption. Following a hearing, the administrative law judge ("ALJ") issued a decision and order denying benefits.[2] App. 14-27. The ALJ invoked the DOL interim presumption based on ventilatory test results that satisfied the table at section 727.203(a)(2). The ALJ found rebuttal of this presumption under section 727.203(b)(2), by proof that the miner is not totally disabled, and under section 727.203(b)(4), by evidence that the miner does not have coal workers' pneumoconiosis. *Id.* 24, 26.

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[2] DOL black lung claims are adjudicated in accordance with the procedures for adversary litigation provided by the Longshore Act. 33 U.S.C. §§ 919, 921, *incorporated in part by reference into* 30 U.S.C. § 932(a); *see Pittston Coal Group*, 109 S. Ct. at 424. SSA black lung claims are adjudicated in accordance with the adjudicatory provisions of the Social Security Act. 42 U.S.C. §§ 404-408, *incorporated by reference into* 30 U.S.C. § 923(b).

Mr. Dayton appealed to the Benefits Review Board, and the Board held that the judge's finding that the claimant does not have coal workers' pneumoconiosis is supported by substantial evidence and in accordance with law. App. 11-12. Because it affirmed the ALJ's finding under section 727.203(b)(4), the Board did not need to address the judge's finding of rebuttal based on evidence that the claimant is not totally disabled. *Id.* 12, n. 1. The claimant appealed to the court of appeals.

The court of appeals reversed the Board, relying on *Taylor v. Clinchfield Coal Co.* App. 5-6. In the *Taylor* case, the Fourth Circuit held that the DOL interim presumption rebuttal rules are invalid to the extent they allow a mine operator to defend a black lung claim by proving (i) the absence of disability due in whole or in part due to coal workers' pneumoconiosis or (ii) the absence of coal workers' pneumoconiosis.

> The interim Labor Department regulations, while containing the [same rebuttal provisions as the SSA interim presumption], add two additional methods of rebuttal under § 727.203(b), which are quoted:
>
> > (b)(3) The evidence establishes that the total disability . . . of the miner did not arise in whole or in part out of coal mine employment; or
> >
> > (b)(4) The evidence establishes that the miner does not . . . have pneumoconiosis.
>
> Thus, the interim Labor Department regulations permit rebuttal of more elements of entitlement to benefits than do the interim HEW regulations which permit rebuttal solely through attacks on the element of total disability.

> The rebuttal provisions of § 727.203(b)(3) and (4) allow the consideration of evidence disputing both the presence of pneumoconiosis and the connection between total disability and coal mine employment. As rebuttal under § 727.203 permits additional criteria by which more elements of statutory entitlement may be rebutted, the provisions are more restrictive than those found in § 410.490 and their application violates 30 U.S.C. § 902(f).

895 F.2d at 182-183 (footnote omitted).

The court below remanded this claim with instructions that the ALJ "determine if the evidence meets the rebuttal provisions under § 410.490. . . . "[3] App. 6-7. In so holding, the court of appeals noted that the ALJ's determination of no pneumoconiosis under section 727.203(b)(4) "is superfluous and has no bearing on the case." *Id.*, n. 1.

Consol submits this petition for certiorari seeking review by this Court of the decision rendered by the court of appeals.

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[3] The Fourth Circuit rejected Consol's argument that the ALJ's finding of rebuttal under section 727.203(b)(2), that the claimant is not totally disabled, required affirmance of the Benefits Review Board's decision because DOL's (b)(2) provision is similar to SSA's section 410.490(c)(2). App. 5. The court explained that since the Board's decision to uphold the ALJ's finding of nonentitlement was based exclusively on subsection (b)(4), it would be inappropriate for the court of appeals to address subsection (b)(2). *Id.*

REASONS FOR GRANTING THE WRIT

The deadline for filing DOL interim presumption claims was March 31, 1980. Even though more than ten years have passed since the expiration of this deadline, it is still not settled what evidence is competent to rebut the DOL interim presumption. This uncertainty prevents final resolution of at least 2,000 DOL interim presumption claims. Moreover, the current rule of law in the Fourth and Seventh Circuits is unacceptable as it requires the awarding of federal black lung benefits even if there is no black lung disease present or disability is unrelated to coal workers' pneumoconiosis.

This Court now has before it four petitions for certiorari presenting different aspects of the following question: What evidence may be considered to rebut the DOL interim presumption?[4] Consol respectfully urges this Court to grant certiorari and consolidate these cases so that all of the theories, perspectives, consequences and issues involved are presented to the Court, all of the perceived differences between SSA and DOL criteria can be addressed, and there can be a final resolution of this controversy.

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[4] In addition to this case, petitions have been filed in *Peabody Coal Company v. Hubert Taylor*, 58 U.S.L.W. 3725 (U.S. May 2, 1990) (No. 89-1696) (7th Cir.); *Pauley v. Bethenergy Mines, Inc.*, 58 U.S.L.W. 3725 (U.S. May 7, 1990) (No. 89-1714) (3d Cir.); *Clinchfield Coal Co. v. John Taylor*, No. 89-___ (U.S. July ___, 1990) (4th Cir.) (petition filed contemporaneous with this petition).

There are at least three reasons why certiorari should be granted in this case: (i) there is a split among the circuits, (ii) the decision below is wrong, and (iii) the issues involved are important.

I. THE CIRCUITS DISAGREE

There exists a clear split among the circuits regarding the validity of subsections (b)(3) and (b)(4) of the DOL interim presumption. *Compare Taylor v. Clinchfield Coal Co.*, 895 F.2d 178, *petition for cert. filed*, No. 89-___ (U.S. July ___, 1990) *and Taylor v. Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. May 2, 1990) (No. 89-1696) *with Bethenergy Mines, Inc. v. Director, Office of Workers' Compensation Programs*, 890 F.2d 1295 (3d Cir. 1989), *petition for cert. filed sub nom. Pauley v. Bethenergy Mines, Inc.*, 58 U.S.L.W. 3725 (U.S. May 7, 1990) (No. 89-1714) *and Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989).

The holding of the Fourth Circuit in *Taylor v. Clinchfield* has already been discussed. *Supra* at 7-8. The Seventh Circuit, in *Taylor v. Peabody*, focused on the DOL rebuttal language that requires the consideration of all relevant medical evidence. *See* 20 C.F.R. § 727.203(b). The Seventh Circuit held that the absence of similar language in the SSA interim presumption breaches the "no more restrictive" prohibition in 30 U.S.C. § 902(f)(2). 892 F.2d at 506-07. On rehearing, the Seventh Circuit refined its opinion to permit consideration of whatever "medical evidence" SSA would consider, apparently assuming that SSA would not consider any such evidence. *Taylor v. Peabody Coal Company*, No. 86-2590, slip op. at 2 (7th Cir. Feb. 1, 1990)(order denying petition for rehearing).

The Sixth Circuit was the first court of appeals to consider the DOL rebuttal provisions after this Court's decision in *Pittston Coal Group*. The Sixth Circuit rejected the argument that the DOL rebuttal rules "are more restrictive than their HEW Part 410 predecessors because the former allows more evidence to be considered for purposes of rebutting the interim presumption than the latter." *Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d at 199. In the Sixth Circuit, the DOL rebuttal rules remain intact.

The Court of Appeals for the Third Circuit acknowledged the conflict between the Sixth and Seventh Circuits, rejected a request to invalidate the DOL rebuttal rules, and held:

> The purpose of the Benefits Act is to provide a recovery for a miner totally disabled at least in part by pneumoconiosis if the disability arises out of coal mine employment. . . . The administrative law judge made unchallenged findings . . . under 20 C.F.R. § 727.203 which established that [the miner's] disability did not arise even in part out of coal mine employment. Thus, even though the Benefits Act has a remedial purpose, it seems perfectly evident that no set of regulations under it may provide that a claimant who is statutorily barred from recovery may nevertheless recover.
>
> . . .
>
> [T]he only way in which we can affirm [the award of benefits] . . . is to hold that even though Bethenergy should, on the law and facts, have prevailed . . . by reason of the presumptions and limitations on rebuttal it must be responsible for benefits. We decline to reach such an unjust result.

Bethenergy Mines, Inc., 890 F.2d at 1300 (citations omitted). A similar statement was made by Chief Judge Ervin in his dissent to the majority opinion in *Taylor v. Clinchfield Coal Co.*: "To preclude rebuttal with evidence that the miner either does not have pneumoconiosis or that his total disability did not arise out of coal mine employment is unacceptable to me." 895 F.2d at 184 (Ervin, C. J., dissenting).

In a recent unpublished decision, the Fourth Circuit acknowledged that its decision to invalidate the DOL rebuttal rules directly conflicts with the case law of the Third and Sixth Circuits, and asked that this controversy be resolved by either Congress or this Court. "We recognize this conflict among the circuits and hope either that Congress will act to clarity these confusing regulations or that the Supreme Court will definitively resolve this conflict." *Robinette v. Director, Office of Workers' Compensation Programs*, 902 F. 2d 1566 (Table)(4th Cir. Apr. 27, 1990)(LEXIS, Genfed library, USAPP file).

II. THE DECISION BELOW IS WRONG

The Fourth Circuit's decision that the ALJ's finding that Mr. Dayton does not have pneumoconiosis is superfluous and irrelevant to resolving this claim is wrong for at least four reasons. First, the Black Lung Benefits Act cannot be read to require the award of benefits to a miner who does not have black lung disease. Second, contrary to the lower court's contention, this Court's holding in *Pittston Coal Group* does not support a finding that the DOL interim presumption rebuttal criteria are invalid. Third, contrary to the contention of the court below, the

DOL rebuttal criteria are not more restrictive than the SSA rebuttal rules. And fourth, the lower court's decision that benefits may be awarded in spite of a judge's finding that the evidence proves the absence of black lung disease violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

A. The decision below violates the clear purpose of the Black Lung Benefits Act.

The sole purpose of the Black Lung Benefits Act is to provide benefits to coal miners and their families on account of total disability or death due to black lung disease. 30 U.S.C. § 901(a). The lower court has held, however, that benefits can be awarded in a DOL interim presumption claim to a miner who does not have black lung disease. This holding obviously violates the stated purpose of the Act.

As noted by the Third Circuit, "even though the Benefits Act has a remedial purpose, it seems perfectly evident that no set of regulations under it may provide that a claimant who is statutorily barred from recovery may nevertheless recover." *Bethenergy Mines, Inc.*, 890 F.2d at 1300 (citations and footnote omitted). As further observed by the Third Circuit, a holding which results in an award of benefits regardless of whether the law and facts require otherwise is "an unjust result." *Id.*

In 1977, when Congress amended the Black Lung Benefits Act by, among other things, authorizing the Secretary of Labor to write eligibility regulations, it provided that such regulations must be designed to compensate

pneumoconiosis.[5] 30 U.S.C. §§ 902(f)(1)(A),(D), 922, 932(h); *see also id.* § 933(a) (requiring mine operators to secure themselves to provide compensation for total disability or death due only to pneumoconiosis); *id.* § 923(b) (requiring the trier-of-fact to consider all relevant medical tests in determining the validity of a claim); *id.* § 932(c) (providing that benefits shall not be charged to a mine operator for death or disability due to pneumoconiosis that did not arise, at least in part, out of employment with that operator after December 31, 1969).

There is nothing within the four corners of the Black Lung Benefits Act, nor is there any legislative history that supports the Fourth Circuit's decision to permit the award of benefits for total disability due to pneumoconiosis where it is proven that the miner does not have black lung disease. "Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). The Black Lung Benefits Act is no exception to this rule.

B. This Court's decision in *Pittston Coal Group* does not support the decision below.

In *Pittston Coal Group*, this Court was presented with the question of whether the DOL rebuttal criteria are more restrictive than the SSA rebuttal rules, and thereby

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[5] Pneumoconiosis is defined by the Black Lung Benefits Act to mean "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

violate section 902(f)(2). Because the respondents in *Pittston Coal Group* conceded the validity of the DOL rebuttal Provisions, this Court noted that it need not decide the question of their validity nor "reconcile their putative validity with our decision today." 109 S. Ct. at 422-23.

Pittston Coal Group invalidated one portion of the affirmative factors for invoking the DOL interim presumption (i.e., the requirement of at least ten years of coal mine employment in order to invoke the presumption with x-ray, biopsy or autopsy evidence of coal workers' pneumoconiosis). *See id.* at 420, 422-23. This Court ruled only that the "statutory requirements are clear" as they relate to the "affirmative factors" for invocation of the DOL interim presumption. *Id.* at 423. There is no evidence of a clear statutory requirement in the Black Lung Benefits Act invalidating the rebuttal provisions of the DOL interim presumption, and there is nothing in *Pittston Coal Group* that holds otherwise.

C. The DOL rebuttal rules are not more restrictive than the SSA rebuttal provisions.

SSA's rebuttal provisions, through cross-references to other regulations, permit the defense of a black lung claim with proof of the absence of coal workers' pneumoconiosis and proof of the absence of disability due in whole or in part to pneumoconiosis. As noted by the Third Circuit, section 410.412(a)(1) is specifically cross-referenced in both of the SSA rebutta! provisions (20 C.F.R. § 410.490(c)(1), (2)), and defines total disability with reference only to disability due to pneumoconiosis.

890 F.2d at 1302. This cross-reference is significant in determining the scope of the SSA interim presumption, but was ignored by the court below.

Furthermore, section 410.426(a), which is incorporated into section 410.412(a)(1) by another cross-reference, provides that "[a] miner shall be determined to be under a disability *only* if his *pneumoconiosis* is (or was) the primary reason for his inability to engage in such comparable and gainful work. *Medical impairments other than pneumoconiosis may not be considered.*" 20 C.F.R. § 410.426(a)(emphasis added).

When the rebuttal provisions of the SSA interim presumption are read in concert with the cross-referenced regulations, it is clear that the SSA presumption may be rebutted by proving that a miner's disability is not "primarily" related to coal dust exposure, and by proof that a miner does not have pneumoconiosis. The Secretary of Labor, in writing the DOL interim presumption, chose to spell out these rebuttal alternatives instead of including them by cross-references to other regulations. Simply stated, the DOL rebuttal rules provide expressly what the SSA rebuttal rules provide through a labyrinthine maze of cross-references.

D. The decision below presents a significant due process question.

As this Court noted in its discussion of the rules for invocation of the DOL interim presumption, "there [must] be 'some rational connection between the fact proved and the ultimate fact presumed' " in order for a presumption to pass constitutional muster. *Mullins Coal*

Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135, 159 n.32 (1987)(quoting *Mobile, Jackson & Kansas City R. Co. v. Turnipseed*, 219 U. S. 35, 43 (1910)); *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28-29 (1976)(upholding the constitutionality of the statutory presumptions provided by the Black Lung Act, as amended in 1972). The validity of presumptions as evidentiary devices to resolve contested issues depends on the strength of the connection between the facts proven and the facts presumed, "and on the degree to which the [evidentiary] device curtails the factfinder's freedom to assess the evidence independently." *Mullins Coal Co.*, 484 U.S. at 157.

In the case at bar, the lower court held that a presumption of total disability due to coal workers' pneumoconiosis invoked by ventilatory test results cannot be rebutted by proving the absence of black lung disease. This holding is constitutionally flawed, from a due process perspective, because there is no relationship between the fact proven (i.e., ventilatory studies which satisfy a table) and the fact presumed (i.e., total disability due to coal workers' pneumoconiosis).

The ventilatory test values specified in the invocation portion of the DOL and SSA interim presumptions suggest neither a diagnosis of black lung disease nor, in the case of older miners, the existence of significant lung impairment. *See* Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. VA. L. REV. 869, 880-83, 885-86, 899-900 (1981). Even so, the presumption of total disability due to black lung disease based on ventilatory test results is not constitutionally suspect so

long as the factfinder can consider all relevant evidence and determine the existence of the presumed facts upon which a finding of entitlement is ultimately based. *See Mullins Coal Co.*, 484 U.S. at 149; *Turner Elkhorn*, 428 U.S. at 35-37.

The lower court's determination that the evidence proving the absence of coal workers' pneumoconiosis is superfluous and irrelevant clearly denies claim defendant's due process of law by requiring the payment of benefits for total disability due to black lung disease even if the absence of pneumoconiosis is proven. No matter how remedial the Black Lung Benefits Act, or how narrow the sweep of the Due Process Clause is in an economic rights setting, Congress may not require the transfer of money from one private party to another where the liability imposed has no basis in reality.

III. THE ISSUES INVOLVED ARE IMPORTANT

Consolidation Coal Company faces liability in approximately 100 claims directly affected by the decision below. More importantly, there are at least 2000 black lung claims against other mine operators and the Black Lung Disability Trust Fund that will turn on the resolution of this case. The Department of Labor estimates the average indemnity cost of a black lung claim to range from $118,000 to more than $186,000. U. S. Dep't of Labor, *1980 Annual Report on Admin. of the Black Lung Benefits Act* 32 (1981). The amount at stake is obviously substantial.

Furthermore, it is significant that the insuring and self-insuring mechanisms employed to secure federal black lung liability for DOL interim presumption claims

are founded on the belief that Congress intended the Black Lung Benefits Act to compensate only disability due to coal workers' pneumoconiosis. If the court of appeals decision in the instant case is left intact, benefits must be paid under the federal black lung program to miners without coal workers' pneumoconiosis and miners without disability due in whole or in part to black lung disease. Clearly, this is not what Congress intended. To hold otherwise is to find that Congress intended to deceive the coal industry and the insurance industry by requiring private funding of general disability and life insurance benefits for coal miners under the guise of a program which declares as its sole purpose the provision of benefits for total disability or death due to pneumoconiosis arising out of coal mine employemnt. It is not probable that Congress intended such a deception.

CONCLUSION

This petition for a writ of certiorari should be granted. This case should be consolidated with Nos. 89-1696 and 89-1714, as well as *Clinchfield Coal Co. v. John Taylor,* No. ___, in order to ensure a final resolution of the important issues presented. Consolidation of these cases will allow the final resolution of thousands of black lung claims originally filed ten or more years ago.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 89-3203

ALBERT C. DAYTON,

Petitioner,

v.

CONSOLIATION COAL COMPANY; OFFICE OF WORKERS COMPENSATION PROGRAM,

Respondents.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The respondent's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Widener with the concurrence of Judge Hall and Judge Anderson, Jr., United States District Judge sitting by designation.

For the Court,

JOHN M. GREACEN /s/
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-3203

ALBERT C. DAYTON,

Petitioner,

versus

CONSOLIDATION COAL COMPANY;
OFFICE OF WORKERS'
COMPENSATION PROGRAM,

Respondents.

On Petition for Review of an Order of the Benefits Review Board.

Argued: June 5, 1989 Decided: February 5, 1990

Before WIDENER and HALL, Circuit Judges, and Joseph ANDERSON, Jr., United States District Judge for the District of South Carolina, sitting by designation.

Thomas Roy Michael for Petitioner. David Allen Barnette (JACKSON & KELLY on brief); Robert Edward Kirschman, Jr. (Jerry G. Thorn, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor for Black Lung Benefits; Sylvia T. Kaser, counsel for Appellate Litigation, on brief) for Respondents.

WIDENER, Circuit Judge:

Albert C. Dayton seeks review of the decision of the Benefits Review Board affirming the denial of his claim for benefits pursuant to the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq*. Dayton contends that application of the interim Labor Department regulations' rebuttal provisions, 20 C.F.R. § 727.203(b), used by the Administrative Law Judge to find rebuttal of his claim, violates 30 U.S.C. § 902(f). Based largely on our decision in *Taylor v. Clinchfield Coal Company*, ___ F.2d ___, No. 87-3852 (4th Cir. 1989), we agree and remand the decision for further consideration under the interim Health, Education and Welfare regulations' rebuttal provisions found in 20 C.F.R. § 410.490(c).

Dayton filed a claim for black lung benefits on November 26, 1979. The Department of Labor's Office of Workers' Compensation Programs made an initial finding of entitlement on the claim on June 12, 1980, and notified Consolidation Coal Company of its potential liability as the responsible operator in the case. Consolidation filed a controversion and requested a formal hearing. The case was heard before an administrative law judge on March 28, 1985.

The parties stipulated that Dayton had demonstrated 17 years of coal mine employment and that Consolidation was the responsible operator. The ALJ evaluated Dayton's claim under the interim labor regulations found at 20 C.F.R. § 727.203. He held that Dayton was entitled to invoke the presumption that he was totally disabled due to pneumoconiosis arising out of coal mine employment under § 727.203(a)(2) on the basis of three qualifying

ventilatory studies. The ALJ also found, however, that Consolidation had rebutted this presumption by showing a lack of total disability under § 727.203(b)(2) and that claimant did not have coal workers' pneumoconiosis under § 727.203(b)(4).

Dayton appealed the ALJ's decision to the Benefits Review Board. The Board noted that no challenge was made to the ALJ's determination that Dayton was entitled to invoke the interim presumption under § 727.203(a)(2), but it upheld that ALJ's decision that Consolidation had rebutted Dayton's claim under § 727.203(b)(4). The Board stated that it was not necessary to address the ALJ's finding of rebuttal under § 727.203(b)(2) and did not reach that issue.

Dayton filed a timely petition for review from the Board's decision with this court. Dayton contends that under § 410.490 a coal operator may only rebut the interim presumption by showing that a claimant is in fact doing or is capable of doing his previous coal mine work or comparable work. *Broyles v. Director, OWCP*, 824 F.2d 327, 329 (4th Cir. 1987); *Couch v. Secretary of HEW*, 774 F.2d 163, 166 (6th Cir. 1985); *Vintson v. Califano*, 592 F.2d 1353, 1356, n.3 (5th Cir. 1979). See *Pittston Coal Group v. Sebben*, 57 U.S.L.W. 4029, 4030 (December 6, 1988). In *Sebben*, the court stated that a coal operator may also rebut a presumption of causation arising under § 410.416. In any event, Dayton argues that under § 410.490, an operator may not rebut by challenging, as Consolidation did in this case, the existence of coal workers' pneumoconiosis. Thus, § 410.490 is less restrictive than § 727.203, and under 20 U.S.C. § 902(f) and our interpretation of that statute in *Broyles*, he is entitled to have his

claim evaluated under the more lenient rebuttal provisions of § 410.490(c).

Our decision in *Taylor* agrees with Dayton's reasoning and is controlling on this issue. In *Taylor* we hold today that the literal language of 30 U.S.C. § 902(f) requires that a claimant who filed after July 1, 1973, but before April 1, 1980, may not be treated less favorable, so far as the criteria under which his claim is analyzed go, than a claimant who filed under the interim HEW regulations on June 30, 1973. Thus, regardless of whether the interim presumption is invoked under § 727.203 or § 410.490, he must have his claim adjudicated under the less restrictive rebuttal standards of § 410.490.

Consolidation argues that the ALJ also found that the presumption was rebutted under § 727.203(b)(2) in that Dayton "is able to do his usual coal mine work or comparable and gainful work. . . . " Since this is similar to rebuttal pursuant to § 410.490(c)(2), Consolidation urges that this finding satisfies the requirements this court set down in *Broyles* and justifies affirmance of the Benefits Review Board's decision. We cannot agree. In its decision in this case, the Board clearly stated that since it was upholding the ALJ's decision on the basis of rebuttal under § 727.203(b)(4) it was unnecessary to address whether or not the ALJ's decision on rebuttal under § 727.203(b)(2) was correct. In reviewing a ruling of an administrative agency we must confine ourselves to the grounds upon which the agency based its action. *Securities and Exchange Commission v. Chenery Corporation*, 318 U.S. 80 (1943). The Board based its affirmance of the ALJ's ruling on rebuttal under § 727.203(b)(4), which,

under 30 U.S.C. § 902(f) and *Taylor*, should not have been available to the coal operator.

The Director argues that restricting coal operators to only those rebuttal provisions allowed for in § 410.490 violates the operator's due process rights in that, under certain circumstances, it creates an irrebuttable presumption in favor of a claimant. While the Director poses an interesting question, we will have no opportunity to address it in this case because the question is not properly before us.

A court may not pass upon a constitutional issue unless the question is raised by a party whose interests entitle him to raise it. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Justice Brandeis concurring). The Director here does not pursue a due process challenge in his own right; he argues that our construction of § 902(f) violates the coal operator's due process rights. A court, however, will not pass upon the constitutional validity of a statute "upon complaint of one who fails to show that he is injured by its operation. . . . Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained." *Ashwander*, 297 U.S. at 348. Consolidation made no mention of this due process argument in its brief here, so we do not consider this issue on appeal. *Keller v. Prince George's County*, 827 F.2d 952, 954 n.1 (4th Cir. 1987).

Accordingly, we remand this case to the Benefits Review Board for further remand to an ALJ to determine if the evidence meets the rebuttal provisions under

§ 410.490, as well as those under § 410.416 if the miner relies upon § 410.416.

REVERSED AND REMANDED
WITH INSTRUCTIONS*

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*We note that the Board stated that its affirmance of the ALJ's determination under § 727.203(b)(4) of no pneumoconiosis precluded entitlement under § 410.490. Since the ALJ should not have considered rebuttal under § 727.203(b)(4), this finding is superfluous and has no bearing on the case.

U. S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D. C.

BRB No. 86-494 BLA
OWCP No. 235-22-4924

ALBERT C. DAYTON, Claimant-Petitioner	)	
v.	)	
CONSOLIDATED COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS'COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest.	)	

Appeal of the Decision and Order of Leonard N. Lawrence, Administrative Law Judge, United States Department of Labor.

Thomas R. Michael (Michael & Kupec), Clarksburg, West Virginia, for claimant.

David Allen Barnette (Jackson, Kelly, Holt & O'Farrell), Charleston, West Virginia, for employer.

Before: SMITH, Acting Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and GRONER, Administrative Law Judge.*

PER CURIAM:

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*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (Supp. IV 1986).

Claimant appeals the Decision and Order (83-BLA-297) of Administrative Law Judge Leonard N. Lawrence denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq*, (the Act). The administrative law judge noted that the parties had stipulated to seventeen years of qualifying coal mine employment and subsequently considered the claim pursuant to 20 C.F.R. Part 727. The administrative law judge found that claimant had established invocation of the interim presumption pursuant to 20 C.F.R. § 727.203(a)(2), but that employer had established rebuttal of the interim presumption pursuant to 20 C.F.R. § 727.203(b)(2) and (b)(4). On appeal, claimant urges that the administrative law judge erred in his consideration of the evidence under subsection (b)(2), that the administrative law judge erred in finding subsection (b)(4) rebuttal established as the physicians of record do not rule out both clinical pneumoconiosis and legal pneumoconiosis, and that the opinions of Drs. Renn and Bellotte are not adequately explained. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), does not respond in this appeal.

The Board's scope of review is limited. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 33

U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keefee v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After review of the evidence of record, the arguments raised on appeal, and the applicable law we hold that the administrative law judge's decision is supported by substantial evidence, is rational, and is based on the applicable law.[1]

In finding subsection (b)(4) rebuttal established, the administrative law judge credited the opinions of Drs. Kress, Bellotte, Renn, and Smith over the opinion of Dr. Sine. Dr. Kress diagnosed emphysema due to smoking, and stated that there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis. Emp. Ex. 2. Dr. Bellotte determined that claimant's pulmonary disability was not caused by exposure to dust from coal mine employment, but by claimant's smoking history and other ailments. Emp. Ex. 1. Dr. Renn diagnosed no pneumoconiosis but stated that claimant's bronchitis resulted from smoking. Emp. Ex. 7. Dr. Smith determined that there was no evidence of occupational pneumoconiosis. Dir. Ex. 28. The administrative law judge held that each one of these reports was a "reasoned medical opinion." Although Dr. Sine diagnosed chronic obstructive lung

[1] As no challenge is made to the administrative law judge's invocation findings, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Additionally, we need not address any errors present in the administrative law judge's finding of subsection (b)(2) rebuttal as affirmance of one method of rebuttal renders discussion of any other method unnecessary. *Tucker v. Consolidation Coal Co.*, 6 BLR 1-720 (1983).

disease caused by coal workers' pneumoconiosis, the administrative law judge properly gave his report less weight as Dr. Sine was a family practitioner and not a pulmonary specialist, while Drs. Renn, Kress, and Bellotte specialized in pulmonary disorders. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Claimant argues that in order to establish rebuttal pursuant to subsection (b)(4), employer must prove the absence of both clinical and legal pneumoconiosis. However, the Board has held that a physician's opinion diagnosing a respiratory disease but finding a claimant's condition unrelated to dust exposure is sufficient to establish rebuttal under subsection (b)(4). *Casella v. Kaiser Steel Corporation*, 9 BLR 1-131 (1986); *Honaker v. Habco Coal Co.*, 6 BLR 1-408 (1983). The opinions of Drs. Kress, Bellotte, and Renn all attribute claimant's disability to his smoking history or other ailments and, thus, are sufficient to establish rebuttal pursuant to subsection (b)(4). Claimant also argues that Drs. Kress, Renn, and Bellotte based their diagnoses of no pneumoconiosis solely on negative x-rays with no other explanations and that, furthermore, neither Dr. Bellotte nor Dr. Renn adequately explained their conclusions. However, our review of the evidence reveals that both Drs. Bellotte and Renn performed physical examinations, reviewed x-rays and pulmonary function studies, and considered claimant's personal and work histories, before making their diagnoses. Additionally, Dr. Renn reviewed blood gas studies and EKG results before reaching his conclusion and, although Dr. Kress did not physically examine claimant, his diagnosis was based on a review of the medical evidence of record including claimant's personal and

work histories, x-rays, pulmonary function studies, blood gas studies, and other physicians' reports. Negative x-ray readings in combination with medical opinions not based solely on x-rays can establish rebuttal of the interim presumption. *Shepherd v. Allied Coals, Inc.*, 8 BLR 1-229 (1985). It was properly within the administrative law judge's discretion to determine that these physicians' reports were adequately supported by the underlying documentation and were, therefore, reasoned medical judgments. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Blevins v. Peabody Coal Co.*, 6 BLR 1-750 (1983). Thus, the administrative law judge's weighing of the medical evidence under subsection (b)(4) was proper and we affirm his findings thereunder.[2]

Accordingly, we affirm the administrative law judge's Decision and Order denying benefits.

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[2] As we affirm the administrative law judge's finding of no pneumoconiosis, entitlement pursuant to 20 C.F.R. § 410.490 and 20 C.F.R. Part 410, Subpart D is precluded, as well. *See Soloe v. Director, OWCP*, 10 BLR 1-125 (1987); *Hall v. Director, OWCP*, 2 BLR 1-998 (1980).

SO ORDERED.

Roy P. Smith /s/
ROY P. SMITH, Acting Chief
Administrative Appeals Judge

Regina C. McGranery /s/
REGINA C. McGRANERY
Administrative Appeals Judge

Samuel B. Groner /s/
SAMUEL B. GRONER
Administrative Law Judge

Dated this 16th
day of December 1988

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, D. C.

ALBERT C. DAYTON, Claimant v. CONSOLIDATED COAL COMPANY, Employer DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Party-in-Interest.	Case No. 83-BLA-297 OWCP No. 235-22-4924

THOMAS R. MICHAEL, ESQ.
For the Claimant

DAVID A. BARNETTE, ESQ.
For the Employer

Before: LEONARD N. LAWRENCE
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* (hereinafter "the Act"). This case was referred to the Office of Administrative Law Judges on October 15, 1982 for formal adjudication. A hearing was held on March 28,

1985 in Morgantown, West Virginia. Albert Dayton, claimant, and John Brown, claimant's co-worker, testified at the hearing. The record was held open for submission of additional evidence.

Subsequent to the hearing the following evidence was submitted by the parties:

Ex. E-7 Medical Report by Dr. Renn, April 14, 1985, and curriculum vitae

Ex. C-8 X-ray Report by Dr. Janis Hurst, April 2, 1985 (x-ray dated 1-21-85)

Ex. C-9 X-ray Report by Dr. Goerlich, April 15, 1985 (x-ray dated 1-21-85)

The issues presented are pneumoconiosis, total disability and causation. The parties have stipulated to the fact that claimant is a miner (Tr. p. 12), that he has demonstrated 17 years of coal mine employment (Tr. p. 13), that his wife Elizabeth is a dependent (Tr. p. 14), and that Consolidated Coal Company is the responsible operator (Tr. p. 41). Based upon the evidence adduced, I make the following findings of fact and conclusions of law.

Pneumoconiosis and Total Disability

Regulations implementing the Act establish a rebuttable interim presumption. This provides that a claimant with at least ten years of coal mine employment is totally disabled due to pneumoconiosis if he meets any one of the criteria set forth in 20 C.F.R. 727.203(a)(1) through (a)(4).[1] Since claimant has met the ten year requirement, this section is applicable.

[1] All subsequent references to the Code of Federal Regulations will apply to Title 20.

Claimant may qualify for the presumption under §727.203(a)(1) if a chest x-ray, biopsy, or autopsy establishes the existence of pneumoconiosis. The following x-ray evidence is contained in the record:

Exh. No.	Date	Physician	Classification	Comments
Dir. Ex. 27	2-13-78	Kwak, A/BCR[2]	0/0	No definite evidence of coal worker's pneumoconiosis, mild diffuse pulmonary emphysema
Dir. Ex. 28	6-11-79	Smith/Jones		No evidence of pneumoconiosis
Dir. Ex. 18	3-20-80	Cole, B/BCR	0/0	
Dir. Ex. 19	3-20-80	?	0/-	
Dir. Ex. 29	8-12-81	Francke, B/BCR		No evidence of pneumoconiosis
Ex. C-8	8-25-82	Hogan, B/BCR		May be some emphysema
Ex. C-3	1-21-85	Bassali, B/BCR	1/2	

[2] "A" or "B" refers to a physician who is qualified as an A-reader or a B-reader; "BCR" refers to a physician who is a Board Certified Radiologist.

Exh. No.	Date	Physician	Classification	Comments
Ex. E-3	1-21-85	Francke, B/BCR		No x-ray evidence of pneumoconiosis
Ex. E-4	1-21-85	Zaldivar, B	0/1	
Ex. E-5	1-21-85	Wiot, B/BCR		No evidence of coal workers' pneumoconiosis
Ex. E-6	1-21-85	Spitz, B/BCR		No evidence of pneumoconiosis
Ex. C-8	1-21-85	Hurst, B	1/0	
Ex. C-9	1-21-85	Goerlich, B/BCR	0/1	Questionable radiographic evidence of pneumoconiosis
Ex. E-7	4-1-85	Renn, B	0/0	

The radiographic evidence is in dispute regarding the existence of pneumoconiosis. The only positive x-ray interpretations are those of Dr. Bassali and Dr. Hurst. Dr. Hurst is not a Board-certified Radiologist, and, even though she is a B-reader, I find that her positive interpretation of the January 21, 1985 x-ray is outweighed by the negative interpretations of a number of Board-certified Radiologists and B-readers. Dr. Bassali is a Board-certified Radiologist and B-reader and therefore his opinion is deserving of great weight, however, five other Board-certified Radiologists and B-readers interpreted this same x-ray as being negative for pneumoconiosis. These five negative interpretations of the January 21, 1985 x-ray, along with the other negative x-ray interpretations by Board certified Radiologists and B-readers, lead me to find that claimant has not established the existence of pneumoconiosis pursuant to §727.203(a)(1) based upon the weight of the x-ray evidence.

To establish entitlement to the presumption under §727.203(a)(2), ventilatory studies must indicate the presence of a chronic respiratory or pulmonary disease according to the values outlined in that section. Four ventilatory studies were performed on Mr. Dayton. In order for a miner of Mr. Dayton's height of 66" to qualify under §727.203(a)(2), he must demonstrate an FEV_1 equal to or less than 2.3L and an MVV equal to or less than 92 L/min. On January 21, 1985, the miner produced an FEV_1 of 1.82 and an MVV of 54 L/m pre-Rx, while the values were 2.08 L and 61 L/m, respectively, post-Rx. (Ex. E-7). Both these pulmonary function tests demonstrate qualifying values and are sufficient to invoke the interim presumption pursuant to to §727.203(a)(2). Two other studies

were performed prior to 1985. The August 21, 1981 study produced qualifying values as well. (Dir. Exh. 29). The study performed on March 10, 1980 had a qualifying FEV_1 value, but the MVV was reported as extremely high. (Dir. Ex. 15). This MVV value was so high as to call in to question its accuracy. (Ex. E-2). Dr. Kress also stated that the tracings on this ventilatory study are inadequate. (Ex. E-2). Assuming, *arguendo*, that the March 10, 1980 test is invalid, the interim presumption of total disability due to pneumoconiosis is still invoked based upon the other three qualifying studies. Accordingly I find that claimant has invoked the interim presumption pursuant to §727.203(a)(2).

Since claimant produced evidence adequate to invoke the interim presumption, the burden of going forward shifts to the Employer to rebut by establishing that either the miner is doing or is capable of doing his usual coal mine employment, he does not have pneumoconiosis or his disability did not arise in whole or in part out of coal mine employment. §727.203(b).

Rebuttal under §727.203(b)(1) is established where the evidence shows that the miner is, in fact, doing his usual coal mine work or comparable and gainful work. There is no evidence that claimant is currently employed and therefore this section is not applicable.

The presumption of total disability due to pneumoconiosis arising out of coal mine employment will be rebutted under §727.203(b)(2) where it is established (1) that the individual is able to do his usual coal mine work or (2) that he is able to do comparable and gainful work. In order to establish claimant's ability to engage in his

usual coal mine work, the employer must (a) demonstrate the absence of a respiratory or pulmonary impairment; or, (b) demonstrate that such impairment is not totally disabling. *Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134 (1984). The evidence in the record consistently demonstrates that claimant is suffering from a respiratory impairment, however, there is disagreement as to whether this impairment is totally disabling. Dr. Rasmussen examined Mr. Dayton on January 21, 1985 and found that he had a "minimal to moderate impairment in respiratory functional capacity." (Ex. C-4). Dr. Rasmussen did not evaluate the exertional requirements of claimant's usual coal mine employment and failed to make any determination of total disability and therefore this report is not sufficiently probative. Claimant's treating physician, Dr. Sine, opined on March 6, 1985 that claimant's illness of chronic obstructive lung disease, as well as his exogenous obesity and his hypertension prevent him from doing his usual coal mine work. (Ex. C-7). Dr. Sine further states that it would be in the miner's best interest not to perform his work considering his moderate impairment and that further exposure would increase his risk of worsening the chronic obstructive lung disease. While Dr. Sine's opinion is entitled to a greater degree of weight based upon his many years of treating the patient, he set forth no evaluation of the exertional requirements of claimant's coal mine work and made no finding as to the miner's total disability. Dr. Sine only stated that claimant had a minimal to moderate impairment. Dr. Sine did perform a medical assessment on March 10, 1980, and found that claimant had difficulty walking up hills and climbing stairs, but this evaluation is insufficient to find total disability. (Dir. Ex. 16).

On the other hand, three qualified physicians have affirmatively determined that claimant is not totally disabled due to his respiratory impairment. Upon a detailed review of claimant's records, Dr. Kress opined that the miner is not totally impaired from a respiratory standpoint but that he may have a mild degree of respiratory impairment related to chronic obstructive lung disease. (Ex. E-2). Dr. Kress also stated on this report dated December 29, 1984, that the claimant is not totally impaired for his coal mine work or other work requiring comparable effort. While Dr. Kress does not fully state the exertional requirements of claimant's work, he does establish the absence of total disability. Although Dr. Kress did not examine the patient, I find his opinion deserves considerable weight in light of his detailed review and commentary on other medical evidence and his impressive professional qualifications.

Dr. Renn examined the claimant on April 1, 1985 and also concluded that the miner is not sufficiently disabled to render him incapable of performing his last known coal mining job of maintenance foreman on the tipple, or any similar work. (Ex. E-7). This impression was arrived at through an evaluation of claimant's occupational history (including a statement as to the exertional requirements of his work), family history, smoking history, medical history, a physical exam and laboratory tests. Claimant's attorney argues that Dr. Renn failed to explain his finding relating to degree of disability and therefore his opinion must be disregarded under *Kurcaba v. Consolidated Coal Co., Director, OWCP*, 6 BLR 1-1 (1983). (Cl. Brief p. 5-6). I disagree. Dr. Renn performed a number of tests on the claimant as well as a physical examination in order

to reach his conclusion that claimant was not totally disabled. An evaluation of laboratory tests and a physical examination, along with assessment of claimant's occupational, cardiopulmonary, smoking, social, family, and past medical history is sufficient explanation for his finding regarding the extent of the miner's disability. The *Kurcaba* decision states that the physician must explain how he can determine, with a reasonable degree of medical certainty, that the miner's impairment is due to smoking rather than coal mine employment under the *Blevins* test pursuant to §727.203(b)(3). *Kurcaba* at pp.1-3. Under §727.203(b)(2), the causal connection between claimant's coal mine employment and his impairment is not at issue, and therefore *Kurcaba* is inapposite. The complete evaluation of the medical records, a physical exam, and the evaluation of patient's history is sufficient to establish lack of total disability under §727.203(b)(2).

Finally, Dr. Bellotte found the claimant not to be totally and permanently disabled based upon his examination of August 12, 1981. (Dir. Ex. 29). This conclusion is based upon a thorough evaluation of claimant's medical history, occupational history, a physical exam, laboratory tests, and a medical assessment of the patient's functional residual capacity. Claimant's attorney argues that the finding of a lack of total disability was based upon non-qualifying blood gas studies and therefore is not sufficient to rebut the presumption of total disability. (Cl. Brief p. 4). I find this argument to be unpersuasive. Non-qualifying test results may be utilized for rebuttal, however, "they cannot be used as the principal or exclusive means of rebutting an interim presumption." *Whicker v. U. S. Dept. of Labor Benefits Review Board*, 733 F.2d 346,

349 (4th Cir. 1984). In the instant case, the blood gas study was not the exclusive basis for Dr. Bellotte's finding. The non-qualifying blood gas study may support his conclusion, as long as it is not the principal or exclusive basis for this finding. Accordingly, I find that the interim presumption of total disability due to pneumoconiosis has been rebutted pursuant to §727.203(b)(2) based upon the medical reports of Dr. Kress, Dr. Renn and Dr. Bellotte.

In addition, the interim presumption may be rebutted pursuant to §727.203(b)(4). Rebuttal under §727.203(b)(4) occurs where the evidence establishes that the miner does not have pneumoconiosis. The only evidence of pneumoconiosis in the record is two positive chest x-rays and a medical report by Dr. Sine. The evaluation of the chest x-rays and the weight to which each is accorded has been set forth under the discussion of §727.203(a)(1). This earlier evaluation of the x-ray evidence also applies to the evaluation of rebuttal evidenced pursuant to §727.203(b)(4) and therefore I find that the two positive x-rays are outweighed by those which were interpreted as negative. However, negative x-ray evidence alone is not sufficient for rebuttal pursuant to §727.203(b)(4). Therefore, the finding of chronic obstructive pulmonary disease caused by coal workers' pneumoconiosis made by Dr. Sine (Ex. C-7) must be weighed against the reports which opine that pneumoconiosis is absent.

On March 6, 1985, Dr. Sine stated that claimant suffered from chronic obstructive pulmonary disease caused by coal worker's pneumoconiosis. (Ex. C-7). This conclusion was based upon the positive x-ray interpretation of Dr. Bassali, the pulmonary function test performed by Dr. Rasmussen and the miner's employment history. While

Dr. Sine's status as claimant's treating physician may entitle his opinion to greater weight, it is not dispositive. Dr. Sine's Family Practice specialty does not render him as qualified as a specialist in pulmonary disease to determine whether claimant has pneumoconiosis.

Four physicians have concluded that claimant does not suffer from pneumoconiosis. On June 11, 1979, Dr. Jones and Dr. Smith examined Mr. Dayton and reviewed his work history, medical history, physical findings and chest x-ray and concluded that there was no evidence of occupational pneumoconiosis. While a negative chest x-ray is insufficient by itself for rebuttal pursuant to §727.203(b)(4), a physician's opinion based only in part upon a negative chest x-ray can be used to rebut the presumption. *Edwards v. Central Coal Co.*, 7 BLR 1-712 (1985). Claimant's attorney states that this medical report is conclusory, undocumented and incomplete. (Cl. Brief p. 3). While the report is not extensive, the results of a physical exam are included along with an evaluation of an exercise tolerance test and chest x-ray. I find that this is a reasoned medical opinion demonstrating the absence of pneumoconiosis which is not based solely on a negative chest x-ray.

On August 14, 1981, Dr. Bellotte examined the miner and concluded that there is not sufficient objective evidence to justify a diagnosis of coal worker's pneumoconiosis. (Dir. Ex. 29). This assessment was based upon occupational history, medical history, chest x-ray, physical examination and laboratory tests. Dr. Bellotte is highly qualified to evaluate claimant's condition based upon his background in pulmonary medicine. (Ex. E-1). I find this report also to be a reasoned medical opinion

setting forth the absence of pneumoconiosis based on a variety of factors and not solely upon a negative chest x-ray.

Dr. Kress also found claimant did not suffer from coal worker's pneumoconiosis. (Ex. E-2). This opinion was based upon Dr. Kress's evaluation of the medical reports which set forth claimant's work history and medical history along with the results of various lab tests and chest x-rays. Dr. Kress specializes in pulmonary diseases and is therefore highly qualified to render an opinion as to claimant's condition. Although his failure to physically examine the miner detracts from the weight to be given his report, I nevertheless find that this is a reasoned medical opinion demonstrating the absence of pneumoconiosis.

Finally, Dr. Renn sets forth his opinion as to the absence of pneumoconiosis based on his examination of claimant on April 1, 1985. (Ex. E.7). His conclusion that claimant does not suffer from pneumoconiosis is based upon an evaluation of claimant's occupational history, cardiopulmonary history, smoking history, medical history, a physical exam, and laboratory tests. In addition, Dr. Renn is well qualified to evaluate claimant's condition based upon his specialization in pulmonary diseases. Accordingly, I find that his report is a reasoned medical opinion demonstrating the absence of pneumoconiosis. Based upon these four medical reports from well-qualified physicians which set forth the absence of pneumoconiosis, I find that the interim presumption has also been rebutted pursuant to §727.203(b)(4) and claimant does not have coal worker's pneumoconiosis.

ORDER

Albert C. Dayton's claim for benefits under the Act is DENIED.

Leonard N. Lawrence /s/
LEONARD N. LAWRENCE
Administrative Law Judge

NOTICE OF APPEALS RIGHTS: Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision, by filing a Notice of Appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D. C. 20036 (20 C.F.R. 725.481).

LNL/LG/mml

U. S. CONSTITUTION

AMENDMENT V – GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

30 U.S.C. § 901(a)

§ 901. Congressional findings and declaration of purpose; short title

(a) Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

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30 U.S.C. § 902(f)(1), (2)

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§ 902. Definitions

For purposes of this subchapter –

* * *

(f)(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that –

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) Such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of –

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under secton 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

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30 U.S.C. § 923(b)

§ 923. Filing of notice of claim

(b) Utilization of personnel and procedures; evidence required to establish claim; medical evidence; affidavits; autopsy reports; reimbursement of expenses

In carrying out the provisions of this part, the Secretary shall to the maximum extent feasible (and consistent with the provisions of this part) utilize the personnel and procedures he uses in determining entitlement to disability insurance benefit payments under section 223 of the Social Security Act [42 U.S.C.A. § 423], but no claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram. In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials. Where there is no medical or other relevant evidence in the case of a deceased miner, such affidavits, from persons not eligible for benefits in such case with respect to claims filed on or after the effective date of the

Black Lung Benefits Amendments of 1981, shall be considered to be sufficient to establish that the miner was totally disabled due to pneumoconiosis or that his or her death was due to pneumoconiosis. In any case, other than that involving a claim filed on or after the effective date of the Black Lung Benefits Amendments of 1981, in which there is other evidence that a miner has a pulmonary or respiratory impairment, the Secretary shall accept a board certified or board eligible radiologist's interpretation of a chest roentgenogram which is of a quality sufficient to demonstrate the presence of pneumoconiosis submitted in support of a claim for benefits under this subchapter if such roentgenogram has been taken by a radiologist or qualified technician, except where the Secretary has reason to believe that the claim has been fraudulently represented. In order to insure that any such roentgenogram is of adequate quality to demonstrate the presence of pneumoconiosis, and in order to provide for uniform quality in the roentgenograms, the Secretary of Labor may, by regulation, establish specific requirements for the techniques used to take roentgenograms of the chest. Unless the Secretary has good cause to believe that an autopsy report is not accurate, or that the condition of the miner is being fraudulently misrepresented, the Secretary shall accept such autopsy report concerning the presence of pneumoconiosis and the stage of advancement of pneumoconiosis. Claimants under this part shall be reimbursed for reasonable medical expenses incurred by them in establishing their claims. For purposes of determining total disability under this part, the provisions of subsections (a), (b), (c), (d), and (g) of section 221 of such Act [42 U.S.C.A. § 421(a) to (d), (g)] shall be applicable. The

provisions of sections 204, 205(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 206, 207, and 208 of the Social Security Act [42 U.S.C.A. §§ 404, 405(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 406, 407, 408], shall be applicable under this part with respect to a miner, widow, child, parent, brother, sister, or dependent, as if benefits under this part were benefits under Title II of such Act [42 U.S.C.A. § 401 et seq.]. Each miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.

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30 U.S.C. § 932(c)

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§ 932. Failure to meet workmen's compensation requirements

(c) Persons entitled to benefits

Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 922(a) of this title in accordance with the regulations of the Secretary applicable under this section: Provided, That, except as provided in subsection (i) of this section, no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis (1) which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969 when it was operated by such operator; or (2) which was the subject of a claim denied before March 1, 1978, and which is or has been approved in accordance with the provisions of section 945 of this title.

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20 C.F.R. § 410.490

§ 410.490 Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) ***Basis for rules.*** In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen

from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) ***Interim presumption.*** With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than –	
	FEV_1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) ***Rebuttal of presumption.*** The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) ***Application of presumption on readjudication.*** Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) ***Failure of miner to qualify under presumption in paragraph (b) of this section.*** Where it ~~is not~~ established on the basis of the presumption in paragraph (b) of this

section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

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20 C.F.R. § 727.203

§ 727.203 Interim Presumption

(a) ***Establishing interim presumption.*** A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than –	
	FEV_1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pC02	Arterial $p0_2$ equal to or less than (mm. Hq.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment.

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) ***Rebuttal of interim presumption***. In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) ***Applicability of Part 718.*** Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) ***Failure of miner to qualify under the presumption in paragraph (a) of this section.*** Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.